IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 427 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MILANBEN WD/O DEVENDRA BABUBHAI PATEL

Versus

SARASWATIBEN WD/O BABUBHAI SHIVABHAI PATEL

Appearance:

1. First Appeal No. 427 of 2003

MR KV SHELAT for Appellant No.1

MR RAJESH K SAVJANI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE M.H.KADRI

Date of decision: 07/10/2003

ORAL JUDGEMENT

The appellant Milanben, widow of Devendra Babubhai Patel, by filing this appeal under Section 299 of the Indian Succession Act (to be referred to as "the

Act" for short) has challenged the judgment and order dated September 17, 2002, passed by the learned Judge, Court No.6, City Civil Court, Ahmedabad in Civil Misc. Application No.778 of 2001, by which the petition filed by the appellant for issuance of probate of the movable and immovable properties of the deceased Babubhai Shivabhai Patel came to be dismissed.

2. The deceased Babubhai Shivabhai Patel was the father in law of the appellant and father of deceased husband of the appellant namely, Devendra Babubhai Patel. The deceased Babubhai Shivabhai Patel and his son deceased Devendra Babubhai Patel had expired in an accident on April 21, 1996. The respondent-Saraswatiben, widow of Babubhai Shivabhai Patel and the appellant and her two minor daughters were alive on the day of death of both the deceased. The deceased Babubhai Shivabhai Patel had executed his will dated September 23, 1995, duly attested by two witnesses namely, Shri Jayantibhai Kathiria and Shri H.B.Trada. The said will was registered with the office of Sub Registrar, Ahmedabad. By the said will the deceased Babubhai had bequeathed all his movable and immovable properties to his son Devendra appointing him as sole owner of the properties. As both father and son had expired on the same day, the appellant and her two minor daughters being the heirs of the deceased Devendra Babubhai, in whose favour the deceased Babubhai had executed a will, filed a petition being Misc. Civil Application No.778 of 2001 for obtaining probate regarding all the properties of the deceased Devendra. In the trial court, affidavit in support of the petition was filed by the appellant on October 1, 2001. Affidavits of two attesting witnesses to the will of the deceased Babubhai were produced with list mark 3/10 and 3/11. In the trial Court, respondent-Saraswatiben had filed affidavit supporting the petition filed by the appellant for issuance of probate in her favour. She had stated in her affidavit that she is only dependent on the appellant and as she was disabled lady, the appellant was looking after and maintaining her. A general notice was published in the daily newspaper Loksatta on October 30, 2001.

3. The trial Judge by the impugned order had dismissed the application filed by the appellant for obtaining probate of the will executed by the deceased Babubhai on the ground that her husband, deceased Devendra had not made the will bequeathing the properties left by him to the appellant and her minor daughters. The learned trial Judge further held that in absence of any will of the deceased Devendra Babubhai, the

properties left behind Devendra would be by intestate succession and in that contingency, the petition for probate cannot be granted and at the end the petition for obtaining probate came to be dismissed which has given rise to filing of this appeal by the appellant.

4. Permission to add Saraswatiben, widow of deceased Babubhai Shivabhai as party-respondent was granted. The notice of the appeal has been duly served on Saraswatiben Shivabhai Patel. The learned advocate Mr. Rajesh K. Savjani has appeared on behalf of the respondent-Saraswatiben. The respondent-Saraswatiben is aged about 82 years and is totally bed ridden and not able to move out of her house. Therefore, as per the direction of this Court, learned advocate Mr. Savjani has visited the residence of Saraswatiben on October 6, 2003. The respondent-Saraswatiben had given her consent in writing indicating that she has no objection if the letters of administration are issued in favour of the appellant with regard to the movable and immovable properties left by the deceased Devendra. The said writing which was signed in the presence of learned advocate Mr. Rajesh K. Savjani is already taken on record of the appeal.

5. It is an admitted fact that the deceased Babubhai Shivabhai and his son Devendra had died in an accident on April 21, 1996. Admittedly the deceased Babubhai Shivabhai had executed the will bequeathing all his movable and immovable properties in favour of his son Devendra. Section 109 of the Act was enacted to prevent a lapse and it has to be assumed that the legatee survived the testator.

6. It would be worthwhile to mention the provisions of Section 21 of the Hindu Succession Act, 1956 to solve the question involved in this appeal. Section 21 reads as under :

> 21. Presumption in cases of simultaneous deaths-
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> Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other, then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder.

7. In an identical facts in the case of Jayantilal v Mehta, AIR 1968 Guj. 212 a mother and her married daughter died in a fire accident and there being no evidence as to who died first, the Court had presumed that the daughter died later and as such she became to

entitled to inherit her mother's property and immediately after that her husband became entitled to inherit her property. Section 21 of the Hindu Succession Act applies both to testamentary as well as intestate succession. Therefore, even though the deceased Babubhai and his son Devendra expired on the same day in an accident, by virtue of Section 21 of the Hindu Succession Act it has to be presumed that the younger survived the elder. The deceased Babubhai had made will in favour of his son Devendra and therefore, by virtue of the will, the deceased Devendra had become the sole owner of the properties left by the deceased Babubhai and he being an executor under the will, the appellant had succeeded the properties of the deceased Devendra.

8. As per the provisions of Section 218 of the Act, if the deceased has died intestate and was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate. Section 218 of the Indian Succession Act reads as under:-

> 218. To whom administration may be granted, where deceased is a Hindu, Muhammadan, Buddhist, Sikh, Jaina or exempted person. (1) If the deceased has died intestate and was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.
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> (2) When several such persons apply for such administration, it shall be in the discretion of the Court to grant it to any one or more of them.
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> (3) When no such person applies, it may be granted to creditor of the deceased.

By virtue of the will of the deceased Babubhai, his son Devendra, who had survived his father had become the owner of the properties left by the deceased Babubhai and under the will, he was appointed as the executor. After his death, his widow, present appellant and his minor daughters were entitled to administer the properties left by the deceased Devendra Babubhai. A Hindu widow, who has an interest in the estate of her husband is entitled to a grant of letters of administration in preference to

a reversioner who has only a contingent interest which may never vest. The appellant and her minor daughters are entitled to grant of letters of administration with regard to movable and immovable properties left by the deceased Devendra, who expired on April 21, 1996. The learned trial Judge has not considered the provisions of Section 109 of the Act and more particularly Section 21 of the Hindu Succession Act.

9. As the respondent-Saraswatiben on whom the notice of this appeal was issued and who is represented by learned advocate Mr. Savjani, has given consent to the issuance of letters of administration in favour of the appellant, this appeal deserves to be allowed. Civil Miscellaneous Application No.778 of 2001 filed by the appellant is allowed. The letters of administration are granted in favour of the appellant herself and she being the guardian of the two minor daughters with regard to the administration of the movable and immovable properties left by the deceased Devendra as shown in Schedule to the petition filed for probate in the trial The Registrar, City Ciil Court, Ahmedabad is directed to issue letters of administration in favour of the appellant as stated above on requisite stamp paper. This appeal is therefore, allowed in terms indicated above. There shall be no order as to costs. Direct service is permitted.

(M.H.Kadri, J.)

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